

## CHAPTER TEN

# POSSESSION IS NINE-TENTHS OF THE LAW

## *Why Wife-Beaters Gain Child Custody*

In 2013, a female plaintiff filed her third divorce petition with a basic-level court in Henan. She had withdrawn her first petition in 2011, and the court denied her second petition in 2012. She claimed that only after getting married did she discover her husband's dark side and violent temper. She stated that her husband treated her and their young daughter as his "punching bags" (出气筒) and that she had tried many times, to no avail, to persuade him to change his ways. She also claimed to have called the police on numerous occasions about his abuse. She added that the defendant had even severely beaten their daughter when she was only nine or ten years old, and when she intervened he beat her "black and blue" (打得遍体鳞伤) too, after which husband and wife spent most of their time apart. The defendant denied the allegations and expressed unwillingness to divorce. Moreover, he said, their daughter had always been living with him under his and his parents' care. Without investigating the plaintiff's domestic violence allegations, the court granted custody to the defendant according to the principle of protecting the rights and interests of children. In its holding, the court explained that their daughter had always been in the physical possession of her father and paternal grandparents. According to the court, because their daughter was accustomed to her environment, preserving the current situation would be in her best interests (Decision #1160567, Luoyang Municipal Jianxi District People's Court, Henan Province, December 9, 2013).<sup>1</sup>

<sup>1</sup> Case ID (2013)涧民四初字第225号, archived at <https://perma.cc/UDY6-VNH4>.

As nonsensical – and even as perverse – as it appears both on its face and vis-à-vis the “best interests of the child” principle cited by the court, rulings such as this are utterly typical in China’s rural courts. Although China’s family laws were designed to protect women and children, and to weaken if not eradicate the patriarchal family, courts in practice have done more to serve than to challenge rural China’s patriarchal order (Li 2022). Courts supported patriarchal prerogatives by ignoring women’s domestic violence allegations and by granting child custody to the parent with physical possession of the child. Paradoxically, domestic violence *reduced* victims’ chances of winning child custody.

Among the reasons is simply that children in rural areas overwhelmingly live with their fathers or their paternal grandparents. In one common scenario, they live with one or both parents in or near their paternal grandparents’ home. In a second common scenario, they are among China’s more than 60 million “left-behind children” who tend to live in villages with their paternal grandparents while their parents participate in labor migration. In a third common scenario explored in Chapter 9, their mothers fled (or were pushed out by) abusive husbands and reluctantly left their children behind, becoming what I have termed “domestic violence refugees.” In a fourth scenario, children were “snatched” away by their fathers. Because judges tend to apply a physical possession standard in their child custody determinations, fathers in all four scenarios enjoy an enormous advantage. Judges’ child custody orders are thus entirely consistent with the adage, “Possession is nine-tenths of the law.” On that basis they routinely grant child custody to fathers who, according to relevant laws and official guidelines, have no business raising them.

As in custody determination proceedings elsewhere in the world, where courts engage in “secondary victimization of abused mothers” (Rivera, Sullivan, and Zeoli 2012) and where women suffer additional “institutional abuse at the hands of the family court” (Bemiller 2008), abused women in China who left their husbands were further victimized by courts when they were denied custody of their children. Courts in China and elsewhere undermine women’s rights by discounting the credibility of their allegations and their moral worthiness of justice and due process (Epstein and Goodman 2019). I demonstrate in this chapter that, beyond these reasons common to different contexts, Chinese judicial decision-making is further shaped by patriarchal practices and beliefs, most notably patrilocality and patrilineality, which remain

pervasive in rural areas, and by heavy caseloads that incentivize judges to follow the most expeditious path.

Child custody spans two chapters. I first illustrate key themes that emerged from my qualitative analysis of selected examples before presenting quantitative patterns of child custody determinations in my full collection of court decisions.

## LAWSON THE BOOKS CONCERNING CHILD CUSTODY

China's ratification in 1992 of the United Nations International Convention on the Rights of the Child affirmed its domestic legal commitments to the protection of children against violence already enshrined in the Constitution; the Law on Protecting the Rights and Interests of Women, also known as the Law on Protecting Women and Children; the Law on Protecting Minors; the Criminal Law; and the General Principles of the Civil Law (R. Zhang 2017:50; also see Chapter 2). While none of these bodies of law explicitly addresses child custody, they and the Marriage Law do contain provisions on violence against women and children that can nonetheless be used in child custody determinations (Su 2018:54; R. Zhang 2017:50). Likewise, the 2015 Anti-Domestic Violence Law is silent on child custody *per se*, but can – and should – support judges' consideration of domestic violence as a factor determining the best interests of the child (D'Attoma 2019).

The 2008 Guidelines (see Chapter 2), by explicitly stipulating that domestic violence offenders are unfit to serve as custodial parents (Article 63; Liu 2013:79n1), are consistent with global best practices of treating spousal abuse and child abuse as part of a common syndrome that puts children's personal safety at risk (Jeffries 2016). They also itemize the numerous harms to children caused by exposure to domestic violence, such as difficulty focusing, diminished academic achievement, truancy, weakened self-esteem, distrust of others, use of violence to solve problems, and so on (Article 13; R. Zhang 2017:49). By doing so they are consistent with the current scholarly consensus on the harms to children of directly witnessing or indirect exposure to domestic violence (Jeffries 2016; Y. Jiang 2019:19; Walker 2017: 155–56; R. Zhang 2017:48).

Notwithstanding China's embrace of relevant global legal norms on paper, judges tend to turn elsewhere for justification of their child custody orders. Legal standards concerning the determination of

child custody come primarily from the SPC's 1993 Several Concrete Opinions Concerning Handling Child Custody Matters in Divorce Trials (hereafter "the 1993 Opinions") and the 2001 Marriage Law. According to the 1993 Opinions, courts, when determining child custody, should "proceed from the position of the best interests of children's physical and mental health and the protection of their lawful rights and interests in conjunction with a consideration of the concrete circumstances of parents' abilities and means to raise children" (Preamble). The most salient provisions in the 1993 Opinions include: (1) custody of children less than two years old should be granted to mothers, with exceptions for illness and other circumstances that privilege fathers (Article 1, the "infant standard");<sup>2</sup> (2) the means to support children in terms of financial security, housing, time, and so on (Preamble, the "financial means standard"); (3) parents with serious chronic infectious diseases or other serious illnesses should not be granted child custody (Article 3, Item 4, the "illness standard"); (4) when the custody of a child who is at least ten years old is contested, the opinions of that child should be considered (Article 5, the "child's opinion standard"); and, most importantly, (5) custody should be granted to the parent with whom the child has been living for a relatively long period of time when a change in the environment would be of obvious harm to the child (Article 3, Item 2, the "physical possession standard"). The only provision in the Marriage Law specifically pertaining to child custody is consistent with the "infant standard" in the 1993 Opinions: custody of nursing babies should be granted to mothers (Article 36). It also stipulates that parents who are not granted custody enjoy visitation rights (探望权, Article 38). Joint legal custody (协议轮流抚养) is a possibility provided by the 1993 Opinions (Article 6), but only if both sides can come to an agreement on relevant terms and if the court agrees that it serves the interests of the child.

Nowhere in the 1993 Opinions or 2001 Marriage Law is a "domestic violence standard." Nonetheless, as previously mentioned, with the strong support of other laws and official guidelines, judges can and should consider domestic violence as a factor in the assessment of a child's health and safety – the very crux of the child's best interests

<sup>2</sup> What I call the "infant standard" is generally known in Europe and the United States as the "tender years doctrine" (Artis 2004).

(R. Zhang 2017:49–52). Owing to multiple and conflicting standards for determining “best interests,” however, judges enjoy enormous latitude on which standard to apply (Su 2018:54; R. Zhang 2017:50). When a father who perpetrated domestic violence has physical possession of a child, does his established history of violence trump the “current situation” in the determination of the child’s best interests and thus tilt the balance in favor of the mother? How do judges treat litigants whom they deem to have failed the “illness standard” owing to a serious injury or mental illness caused by domestic violence? Similarly, how do judges treat litigants whom they deem to have failed the “financial means standard” as a consequence of giving up stable work and housing in order to escape domestic violence? The 2008 Guidelines explicitly address scenarios such as these, and call on judges to privilege the safety of children by granting custody to victims even if their life situation is somewhat financially precarious. For example, they stipulate that judges, when assessing parents’ financial means to raise their children, should consider victims’ *potential* abilities as well as victims’ abilities *prior* to marriage or *prior* to the abuse (Article 64).

As we will see, however, judges generally ignore the 2008 Guidelines because they are for reference purposes and cannot be used as the legal basis of court rulings (Y. Jiang 2019:20). Judges instead tend to apply the “physical possession standard” when they award child custody to fathers who, on the basis of other circumstances, including domestic violence, should be disqualified from serving as legal custodians on the basis of competing legal standards.

According to the 1993 Opinions, parents who are not granted child support and who have stable income should make child support payments in the amount of 20–30% of monthly gross income (Article 7). When the plaintiff is awarded child custody, the defendant’s whereabouts are unknown, and the defendant’s income is unknown, child support payments are calculated as 20–30% of the average annual income for the local area (divided by 12 to arrive at a monthly payment) (Dong and Ji 2016:92–93). In practice, courts often use 25% – the midpoint of this range – as the income divisor, and sometimes order annual payments (monthly payments multiplied by 12) or even one-time lump sum payments (monthly payments multiplied by the number of months until the child turns 18). I do not analyze child support orders in this book.

WHAT WE KNOW ABOUT THE LAW IN ACTION  
CONCERNING CHILD CUSTODY

From the limited empirical research on differences between mothers and fathers in the likelihood of receiving child custody rights, we can piece together a blurry picture of fathers' advantage in rural areas and mothers' advantage in urban areas. A study of 114 child custody decisions from courts of all types across China reveals fathers' overall advantage (Y. Jiang 2019:19). In another study of 512 child custody decisions made by three basic-level courts in Hainan Province – two rural and one urban – judges were far more likely to grant child custody to fathers (Hu 2016; Hu and Shen 2016). A similarly stark paternal advantage emerges from an analysis of 281 child custody decisions made by a basic-level county court in rural Chongqing (Chen and Zhang 2015). In contrast, a study of courts in more developed urban areas appears to tell the opposite story. According to findings from an analysis of 405 child custody decisions from courts in five cities in southern Jiangsu Province, one of the most prosperous parts of China, mothers enjoyed a considerable advantage (Zhao 2019). This picture of a contrast between rural and urban courts, however, is muddied by an anomalous study of 182 child custody decisions made by three rural basic-level courts in Jilin Province. Here mothers enjoyed an overwhelming advantage, which the authors attribute to mothers' greater inclination to petition for child custody (Hongxiang Li 2014; Li, Wang, and Zheng 2016). The findings I present later in Chapter 11 from a collection of child custody decisions several dozen orders of magnitude larger than these small samples – and from hundreds rather than only one or a few courts – paint a clear picture of a sizeable advantage to fathers in rural courts and of a similarly sizeable advantage to mothers in urban courts.

Turning to the question of the legal standards judges apply to custody determinations, previous research shows that courts tend to grant custody of infants to their mothers (Chen and Zhang 2015; Zhao and Ding 2016). Although the “infant standard” seems cut and dried, judges have some room to make exceptions, thanks to a catch-all “other circumstances” provision that can be used to disqualify mothers from raising their infant or nursing children. When it comes to older children, however, the “physical possession standard” seems to dominate child custody determinations. This was the clear finding of a study of basic-level courts in Nanjing's urban districts (Zhao and

Ding 2016), a study of a basic-level county court in rural Chongqing (Chen and Zhang 2015), and a study of 300 child custody disputes across China (Xia 2020). Judges typically disregard other legally relevant circumstances, including domestic violence. The author of a study of child custody decisions from Beijing in 2016 and 2017 found that “under most circumstances, domestic violence was not a factor in the determination of child custody. ... Even in cases involving domestic violence, the primary factors courts took into consideration were preserving the current situation and the opinions of children ten years of age and older” (Su 2018:54). At the same time, however, another study found that courts rarely solicited the opinions of qualified children (Chen and Zhang 2015:29). Prior research also suggests that, more generally, the impact of the 2015 Anti-Domestic Violence Law has been limited at best, even beyond the realm of child custody (Y. Jiang 2019).

Child custody is not always disputed. Litigants often reach an agreement on child custody, obviating the need for judges to adjudicate. However, such agreements are not always entirely voluntary. A great deal of informal bargaining occurs in the litigation process, often at the behest – or at least with the support – of the court. Indeed, by instructing courts to make child custody rulings only when the parents cannot come to a mutual agreement on their own, Article 36 of the Marriage Law incentivizes judges to orchestrate child custody agreements, which they often bring about by applying pressure through mediation. In his study of rural courts, Zhu Suli (2016:200) asserts that judges “use discretionary measures to force the party who is more eager for a divorce to make greater concession [sic] on property division or in some other aspect.” Here, of course, “some other aspect” includes child custody. In the trial process, judges do not passively hear arguments and weigh evidence; whenever possible, they actively broker deals between litigants (Ng and He 2017a:40).

When abusive husbands withhold consent to divorce, women, in desperation, often “agree” to give up child custody in exchange for their freedom (Li 2015a, 2015b). Even when their husbands consent to divorce, women may still find themselves under enormous pressure from courts, their husbands’ families, and sometimes even their natal families to drop their child custody claims (Li 2022; Tan 2017). In a process Ke Li aptly characterizes as “collusion,” legal advocates sometimes persuade their female clients to give up child custody and marital

property, and in so doing help judges and abusive husbands more than the clients they ostensibly represent (Li 2022). According to one study:

Owing to the vestiges of the feudal ideology of ‘carrying forward the ancestral line through sons’ [传宗接代], even if a court does grant custody of a son to his mother, the male side may not accept defeat, and may resort to abuse and violence against the female side; the female side may concede child custody to the male side in order to get out of the marriage as quickly as possible. (Tan 2017:270)

All the foregoing types of concessions, which are typically recorded by judges as “voluntary” (自愿), are tantamount to coercion.

Given the importance of physical possession in the determination of child custody, some men resort to other extreme measures to enhance their bargaining power in court. As one observer puts it,

Children who have been snatched in divorce battles have become objects that at any moment can be transformed into “things” to be hidden and to serve as bargaining chips [谈判的筹码]. They lose their basic personal freedoms, their original lives and educational environments are crudely upended, and they are forced into separation from their mothers or siblings; they are like “hostages.” (R. Zhang 2017:49)

As we will see, abuse victims who flee for their lives and leave their children behind are at a severe disadvantage with respect to child custody because the children are left in the exclusive physical possession of their husbands and parents-in-law. Further aggravating their victims’ plight, abusers may take advantage of the opportunity to hide marital assets and deprive their wives of their lawful property rights (Fincher 2014; Wu 2014:101–2).

Several reports on divorce litigation in China address the problem of parents “snatching” their own children (Fincher 2014:161–62; Thomas 2016). The logic of child-snatching is twofold. First, given that courts so rarely grant joint custody, child custody is almost always a zero-sum game in only-child families, and can even be so in multi-child families. Second, as discussed earlier, courts tend to privilege the parent with physical possession of the child. According to one estimate, “children are forcefully snatched” (抢孩) or “hidden” (藏匿) by a parent in as many as 60% of cases involving child custody disputes (Zhang 2017:47n2). Fathers who win custody, sometimes as a direct consequence of child-snatching, often block mothers from physical access to – or even communication with – their own children (Thomas 2016; Zhang 2017:48). Even when courts do grant child custody to mothers,

they rarely enforce their judgments (Fincher 2014:145; Li 2015b:165; Palmer 2007:684n28; Tan 2017:270; Zeng 2013:242). Physical possession is therefore tantamount to *de facto* custody that courts often subsequently formalize in their rulings. Likewise, courts rarely enforce visitation rights provided by the Marriage Law to parents without legal custody (Li, Wang, and Zheng 2016:19; Ni 2014:214).

Consistent with research outside China showing that abusive men use child custody as a way to continue to exert control (Bemiller 2008:247; Jeffries 2016; Rivera, Sullivan, and Zeoli 2012:235), one study even reports instances of men harming their children as a method of exacting revenge against their wives, or to lure their wives back home (R. Zhang 2017:48). To some judges, violence against children is a red line that precludes any chance of child custody. However, husbands beating their wives is another matter. Like some judges elsewhere in the world (Bemiller 2008; Jeffries 2016; Walker 2017:114), Chinese judges may believe a wife-beater can be a good father, or at least that documented violence against a spouse does not appreciably increase safety risks to a child. In the words of a Chinese judge:

If one side inflicts severe violence against a child, all bets are off when it comes to child custody; I will not grant child custody to him. In cases where there is domestic violence but the victim is not a child, however, I will take the domestic violence behavior into consideration as a strike against the offender's bid for child custody, but will not deprive him of child custody rights solely on this basis; I will make my determination according to the concrete circumstances of the case. (R. Zhang 2017:48)

The same study includes additional evidence that judges are not averse to granting child custody to perpetrators of domestic violence. In a court in Hunan Province, a 43-year-old female plaintiff filed for divorce as a last resort after her husband committed "extremely serious" domestic violence that caused liver and kidney hematomas. The court granted custody of their daughter to the plaintiff and custody of their son to the defendant (R. Zhang 2017:48n4).

## EXPLAINING WHY PHYSICAL POSSESSION IS THE DOMINANT CHILD CUSTODY STANDARD

Judges disregard domestic violence for a variety of reasons. They may assume women exaggerate or fabricate domestic violence claims to gain child custody or unfair advantage in some other respect; a woman's

domestic violence claim can therefore backfire by diminishing her personal credibility (Bemiller 2008; Epstein and Goodman 2019; He and Ng 2013a; Jeffries 2016; Perrin 2017; Rathus et al. 2019). They may also normalize or trivialize abuse as ordinary marital friction that does not rise to the level of domestic violence (Epstein and Goodman 2019; J. Jiang 2019; Li 2015b).

Judges all over the world choose from a menu of competing legal standards. In Australia, Canada, Ireland, New Zealand, the United Kingdom, and the United States, for example, judges often grant joint custody of children to abusive husbands when, in their assessment, the best interests of the child are served by co-parenting more than they are jeopardized by domestic violence – owing in part to the success of the “fathers’ rights” movement. Judges operate under the misguided belief that spousal abuse poses negligible risks to children, that bad husbands can be good parents, and that domestic violence inflicted against spouses is therefore of limited relevance to custody determinations (Bemiller 2008; Jeffries 2016).

As we will see, there is no apparent need for a fathers’ rights movement in China; fathers already have the courts’ full attention, particularly in rural areas where men enjoy considerable advantages in divorce litigation. In China, two key reasons explain why judges downplay and ignore domestic violence when determining child custody. First, judges support durable patriarchal values and practices, most notably patrilocality and patrilineality. In so doing, they endorse and enforce some of the very *cultural* rules of patriarchy that have been denounced and prohibited by the *legal* rules of China’s party-state. Second, judges’ tendency to preserve the status quo also reflects their imperative to maximize judicial efficiency and social stability. Under the dual pressure of crushing dockets and stability maintenance mandates, the physical possession standard helps judges close divorce cases efficiently while minimizing contentiousness.

### **Judges Privileged Patriarchy over the Safety of Women and Children**

Perhaps judges tend to apply the physical possession standard because doing so preserves what they view, either consciously or unconsciously, as the normatively proper patriarchal order. As we will see, the majority of child custody decisions are made by courts that serve predominantly rural populations. In rural China, owing to the overwhelming practice of patrilocality and village exogamy, wives typically come

from outside the village, move into the husband's village, and reside in or near the husband's home (Chen 2005; Gruijters and Ermisch 2019). As perennial outsiders, wives might never enjoy recognition as full-fledged members of their marital families or even of their marital villages. Often knowing nobody when they arrive (Baker 1979:42), their limited social support – particularly relative to that of their husbands – puts them at a disadvantage in many domains, including divorce litigation (Li 2016). According to tradition, only after fulfilling her primary obligation to produce a son does a rural woman enjoy some measure of status and security in her husband's home (Baker 1979:47).

[T]he birth of a son was of the greatest importance to a family, not only in order to provide for the parents in their old age, but also in connection with ancestor worship. A daughter being of no help in either direction, her birth was not a matter of such joy or importance. All families therefore, did their utmost either to beget a son or, if that were impossible, to adopt one. (Baker 1979:3)

A rural woman's plight may be compounded by the legendarily fraught relationship between daughters-in-law and mothers-in-law. Rural patrilocality often means that women cannot avoid tyrannical mothers-in-law (Baker 1979:43), a theme that emerged in many court decisions I analyzed for this chapter.

Patriarchy is manifested in various ways. In some parts of rural China, “many couples get pregnant first and then get married; if the female side does not get pregnant after cohabitating for a period of time, she faces the risk of desertion” (Hu and Shen 2016:127). Reflecting entrenched son preference in rural China, one plaintiff reported that “the defendant's attitude towards me diametrically changed after I gave birth to a girl [in 2010]; when it came to the question of whether I would have another child, he and his parents incessantly harangued me” (Decision #2611439, Shaoxing Municipal Yuecheng District People's Court, Zhejiang Province, December 6, 2013).<sup>3</sup> In the samples of court decisions I analyze in this book, hundreds of plaintiffs seeking divorce reported to be in arranged marriages, which had been outlawed by Article 1 of the 1950 Marriage Law. Despite campaigns in the early 1950s to enforce the Marriage Law for the official purpose of eradicating arranged marriage, bigamy, bride-buying, and other

<sup>3</sup> Case ID (2013)绍越民初字第4064号, archived at <https://perma.cc/3LZS-URYT>.

“feudal” practices that oppressed women (Deng 2016:187; Diamant 2000a, 2000b), China’s family laws have symbolically promoted gender equality while serving in practice to reproduce patriarchy (Davis 2010, 2014; Friedman 2006; He and Ng 2013a, 2013b; Johnson 1983; Li 2022; Palmer 2017; Stacey 1983; Wolf 1985).

One report chronicles the saga of a female plaintiff who filed for divorce in a basic-level court in a rural district belonging to the city of Xuzhou. She described how, over a period of five years, her husband’s affection turned cold after she failed to get pregnant. They constantly fought about her apparent barrenness. In his words, “Isn’t it true that men in the countryside marry women in order to have children?” She shot back, “He should think about his older age and realize that eight or nine times out of ten it’s the man’s problem when a woman doesn’t get pregnant.” After years of conflict, she filed for divorce and exclaimed in her statement to the court, “Liu Xin’an [the defendant] married me only for the sake of continuing his family’s ancestral line [传宗接代]. I was unable to get pregnant, and now he wants another woman to have his child!” (Tian 2016:26). Even if the plaintiff’s fears were unfounded in this particular case, they were probably not unreasonable: “In the absence of a son, some men, influenced by the cultural importance of the continuum of descent, will use unscrupulous physical methods and shack up with another woman as a scheme to produce a son who will continue to ‘burn incense’ for the family [男孩续‘香火’]” (Ye 2007:43).<sup>4</sup> Although the plaintiff in this moralistic story was ultimately able to avert divorce and live happily ever after,<sup>5</sup> her case illuminates the powerful patriarchal forces that valorize sons to the point of vastly reducing mothers’ chances of gaining custody of sons.

So-called skipped-generation (隔代) households form when rural parents join China’s over 220 million migrant workers and leave their children behind in the care of grandparents (Duan et al. 2013). According to data from the 2010 population census, China’s 61 million left-behind children accounted for 22% of all children and

<sup>4</sup> Burning incense refers to ancestor worship. On this and the continuum of descent, see Baker (1979).

<sup>5</sup> The article in which this case was featured was written for a public audience and published in a popular magazine. The presiding judge ordered a six-month cooling-off period on the grounds that the petition was frivolous, impulsive, and an abuse of the freedom of divorce. In the fifth month, just as the cooling-off period was about to expire, the plaintiff became pregnant at the age of 43. With the help of the court’s marriage counseling, her husband once again displayed love and affection, and she called off the divorce. Later she gave birth to fraternal twins, one boy and one girl (Tian 2016:26–27).

38% of all rural children nationwide (All China Women's Federation Research Team 2013). Between 2000 and 2005, China's population of left-behind children almost tripled from 20 to 59 million (Duan et al. 2013). Their population increased again to over 90 million in 2016 before dropping back down to about 70 million in 2018 following central government policies to incentivize parents to stay in their villages (Geng and Wang 2018). In 2010, the majority of all left-behind children – an estimated 57% – were in the care of their grandparents. Among children left behind by both parents, an estimated 70% were in the care of their grandparents (Duan et al. 2013:43).<sup>6</sup> All evidence points to paternal grandparents as the default custodians of China's left-behind children. Maternal grandparents, by contrast, play a much smaller role (Bai et al. 2018; Chen, Liu, and Mair 2011; Hou 2019; Li 2018; Lu 2017; Zeng et al. 2013). When migrant workers divorce, their minor children are likely living with or otherwise under the care of paternal grandparents. Rural fathers therefore derive an immense advantage in divorce litigation from judges' tendency to preserve the status quo by granting child custody to the parent with physical possession.

Fathers gain additional advantage from skewed sex ratios in rural China, where boys far outnumber girls. With limited chances to bear a son under China's family planning policies, many rural parents did not leave things to chance. Son preference reflects both enduring patriarchal cultural forces and pragmatic old-age security considerations, and was realized by the widespread practice of sex-selective abortion. Rural sex ratios at birth became highly distorted as a result (for a review of the literature on this issue, see Michelson 2010:191–92). As we shall see in Chapter 11, courts often match child and parent sex when determining child custody. For this reason, all else being equal, mothers' chances of winning child custody in rural China are further reduced by the greater supply of sons relative to daughters.

The upshot is that sons are coveted and vigilantly guarded by their fathers' families. "In rural China, men continue to occupy a dominant position; women have no right to speak, and no property rights. ... The ideology of the 'continuum of descent' remains relatively widespread in the countryside, and men will do everything in their power to fight for child custody" (Zeng 2013:242). To many rural women, therefore, making a claim for child custody, particularly of a son, may seem futile.

<sup>6</sup> The remaining left-behind children were under the care of other people or lived independently.

Under patrilocality, even when mother and father are living with a child under the same roof, the roof is understood to be the father's. According to prevailing *legal* rules, mother and father have equal claims to custody of a child in the physical possession of both parents. Prevailing *cultural* rules, however, dictate that the father and his family enjoy exclusive rights to the child. "In the countryside, many people take for granted as obvious that, after a couple divorces, custody of their children, particularly sons, should be granted to fathers. For this reason, women find it difficult to assert and protect their child custody rights" (Fan 2017:145).

The authors of one study identify three primary reasons, all rooted in patriarchy, why rural courts tend to privilege fathers:

First, influenced by the "continuum of descent" ideology, when husbands and wives divorce, the husband's family always wants to maintain custody of the children, particularly of sons. ... Second, the majority of basic-level court personnel are deeply influenced by this traditional ideology. This phenomenon is further heightened by a lack of gender consciousness in society. Third, some mothers fear that raising minor children will affect their ability to form a new family (Hu and Shen 2016:126–27).

Even if mothers themselves do not endorse the third reason, judicial authorities may use it to rationalize denying – or to pressure mothers to waive – their child custody claims, as seen in the following interaction between a woman seeking divorce in rural China and her legal representative.

[D]ivorced women are further depreciated on the marriage market if they bring children from previous relationships into new ones. Adding insult to injury, the children would become "*tuoyouping* [拖油瓶, literally an 'oil bottle in tow']," a derogative term for those who follow divorced mothers into remarriages. In line with this cultural logic, the legal worker announced: "you'll be better off letting him [the husband] raise the kid." (Li 2015b:164)

Elsewhere in the world, women's remarriage prospects are indeed diminished by having children in tow (de Graaf and Kalmijn 2003; Di Nallo 2019).

Authors of several studies have similarly argued that judges' child custody determinations are influenced by patriarchy because judges themselves have internalized patriarchal values and thus endorse the cultural importance of the family lineage (Chen and Zhang 2015:28–29;

Hu and Shen 2016:129; Li 2015b:164). Women accounted for fewer than one-third of China's judges in 2013 (Zheng et al. 2017:177). Meanwhile, as we have seen, approximately two-thirds of plaintiffs seeking divorce are women. Some research even suggests that female and male judges are similarly supportive of patriarchal cultural norms, similarly (un)sympathetic of female litigants and (in)credulous of their legal complaints, and therefore similarly biased in favor of male litigants (Bu et al. 2015:11). Perhaps female judges are more sympathetic than male judges to the plight of female litigants but are also more fearful than male judges of threats to their personal safety posed by potentially violent male litigants.

Even if their decisions are not motivated by patriarchal cultural beliefs, judges may fear retaliation from husbands, particularly those with established histories of violence. In the wake of several high-profile murders of judges by men or their family members disgruntled by a divorce outcome, judges' tendency to favor fathers is therefore also shaped by a consideration of their own safety more than of children's safety (Chapter 3).

### **Judges' Privileged Efficiency over the Safety of Women and Children**

Court reforms over the past decade have been guided by the dual imperative to enhance judicial efficiency and minimize social unrest (Chapters 3, 5, and 6). Determining child custody on the basis of the child's physical location helps judges close divorce cases quickly and reduces the likelihood of appeals, complaints, and petitioning by disgruntled litigants – for which judges are penalized on their performance evaluations (Chapter 3). Setting aside the infant standard, which judges tend to apply by default in custody disputes involving children less than two years old, the physical possession standard is usually less fraught than other competing standards. In custody disputes involving children at least two years of age, judges can render a quick ruling after merely ascertaining the child's recent and ongoing living arrangements. Insofar as litigants generally agree on the child's physical location as a simple factual matter, the application of the physical possession standard obviates the need for judges to undertake potentially contentious and time-consuming fact-finding investigations, assessments of evidence, and witness interviews. For similar reasons, French divorce judges tend to uphold “*de facto* situations” (Biland and Steinmetz 2017:303, 314).

Chinese legal standards pertaining to child custody provide little in the way of concrete clarity and guidance (Su 2018:54; R. Zhang 2017:50). Legal ambiguity demands the exercise of judicial discretion in the determination of the nature and extent of abuse necessary to disqualify a wife-beater; the material resources necessary to meet the financial means standard; and whether an ailment is sufficiently serious to meet the illness standard. Because vague standards invite contestation, judges are averse to apply them. Establishing the validity of marital abuse allegations can be onerous in terms of time and evidentiary requirements. And even though the 2008 Guidelines call on judges to relax evidentiary standards and to believe women's oral statements (Chapter 2), judges are loath to affirm domestic violence claims lest an angry husband carry out an "extreme incident" of retaliation against his wife – for which the judge would be held liable and punished – or possibly even against the judge (Chapter 3). Likewise, determining the material fitness of a parent through the application of the financial means standard and the physical fitness of a parent through the application of the illness standard are, from the perspective of judges, similarly undesirable, risky propositions.

The physical possession standard, by contrast, is relatively unambiguous. Given the relatively clear-cut nature of the child's living arrangements, litigants will likely see little reason or recourse for challenging the fairness of a ruling against their favor made on this basis. A judge merely needs to ask, "Where has the child been living?" If both parties agree on the answer, which in rural areas is most likely to be the home of the child's father or his family, the judge can simply hold: "According to the law, it would be in the child's best interests to stay there." In short, the physical possession standard can be a divorce judge's best friend and a female litigant's worst enemy. Judges' overreliance on the physical possession standard streamlines their work often at the expense of both women's due process rights and children's safety.

#### CASE EXAMPLES ILLUSTRATING JUDGES' DISREGARD FOR DOMESTIC VIOLENCE WHEN DETERMINING CHILD CUSTODY

The cases I analyze in this chapter come from a larger collection of 33,033 child custody decisions – 19,201 from Henan and 13,832 from Zhejiang – made by every one of the 252 basic-level courts in both provinces. I analyze cases primarily but not exclusively from rural

courts because, as we know, this is where most divorce litigation occurs. I selected cases for qualitative analysis in three steps. First, I identified the over 8,500 decisions in both provincial collections of child custody decisions that contain plaintiff allegations of domestic violence. Second, among these decisions, I randomly selected 100 from each province (200 total). Third, I read through them in search of salient examples of prominent themes, focusing on cases in which the child custody claims of female plaintiffs were denied. As I analyzed the case examples, I organized them according to the key themes they illustrate. Each theme relates to a strategy or set of strategies judges used to sideline domestic violence allegations. Each subsection corresponds to a theme. I selected 25 case examples, 14 from Henan and 11 from Zhejiang.

Some of the cases I present will appear extreme or anomalous at best and outrageously implausible at worst. Truth can indeed be stranger than fiction. The case examples were not hard to find; I barely scratched the surface. Let us assume that within my collection of 8,500 child custody decisions containing plaintiff allegations of domestic violence, every 200 randomly selected cases contain 25 stories similar to those I selected for this chapter. If so, my collection as a whole could contain over 1,000 more horrifying case examples. This puts the sheer scale and human toll of gender injustice in China's courts into perspective.

Not surprisingly, given that about 90% of all plaintiffs who made domestic violence allegations were women, the plaintiff was female in each case example. Moreover, the plaintiff petitioned for child custody in every case example but one. Among all 25 case examples, 10 involved only-daughters, 12 involved only-sons, and 3 involved sibling children (one daughter and one son in all 3 cases). The court awarded child custody to the plaintiff in only 4 cases, 1 of which involved an only daughter and 2 of which involved sibling children who were split up between the parents. In 1 case of siblings split up between the parents, custody of the daughter was granted to the mother and custody of the son was granted to the father. In the other case in which the court split up custody of siblings, custody of the son was granted to the mother because he was only four years old. In 3 of the 4 cases in which the plaintiff was awarded child custody, she already had physical possession of the child. I present 19 out of all 25 case examples in this chapter. The remainder are available online as supplementary case examples.

I will begin with a representative case:

The court affirms the following facts: ... Plaintiff and defendant became acquainted in June 2007, and started living together after their relationship became romantic. In May 2008 they held a wedding ceremony according to rural customs, and their son was born on November 24, 2008. On May 6, 2009, they registered their marriage at the Luohe Municipal Yancheng District Civil Affairs Bureau. Prior to getting married, the two sides lacked mutual understanding, and the defendant beat and cursed the plaintiff over minor matters. In 2011, when the plaintiff filed for divorce, this court denied her petition. Both plaintiff and defendant are migrant workers, and their son lives with the defendant's parents when they are away.

This solitary case encapsulates several themes animating court-adjudicated divorce cases in China. First, it palpably illustrates the influence of patriarchy. Like many marriages in rural areas, this one was registered retroactively. As discussed earlier, many rural couples wait until pregnancy before holding a wedding ceremony. Second, domestic violence claims are pervasive in divorce petitions filed by women seeking to divorce their husbands in China's courts. Third, in accordance with the judicial norm of the divorce twofer, courts typically deny first-attempt divorce petitions and grant petitions on subsequent attempts. Fourth, owing to dominant rural norms of patrilocality and patrilineality, wives usually move into the husband's village, or even into the in-law's home, and experience weak and marginal status as perennial outsiders – just as they have for centuries (Baker 1979:2; F. Chen 2005; Gruijters and Ermisch 2019). Indeed, in my randomly selected examples, I encountered no cases of matrilocal families (上门女婿). Fifth, under the same norms, children, particularly sons, are widely regarded as the exclusive descendants of their paternal lines. Sixth, rural China's left-behind children are typically in the care of their paternal grandparents.

Continuing with the case, the court's holding amply illustrates the tension between judges' mandate to follow the law and their impulse to ignore and subvert it:

Proceeding from the position of the best interests of children's physical and mental health and the protection of their lawful rights and interests, and given the actual circumstances of the son, Ying Ningtong, who is currently living with the defendant's parents, an endeavor to avoid a sudden change in his living environment, and the defendant's request for custody, the son Ying Ningtong should continue to live with the defendant.

This was the basis of the court's decision to grant child custody to the man it had just confirmed to have beaten his wife (Decision #1113605, Luohe Municipal Yancheng District People's Court, Henan Province, January 15, 2014).<sup>7</sup> As we will continue to see, child custody determinations are fraught with contradictions. Indeed, "feudal" patriarchal norms such as these often upheld by rural courts are explicitly condemned by Chinese law.

### **Judges Ignored the Violence Precipitating Mothers' Separation from Their Children**

When a Chinese woman is abused by her husband, she will often "endure violence" rather than pursue divorce. At some point, whether she files for divorce or not, she is likely to seek refuge with and help from her natal family (Liu and Chan 1999; Wang, Fang, and Li 2013:36, 67). Sometimes these women take their children with them. Often, however, under duress, they leave their children behind. When this happens, judges focus narrowly on the specific question of physical possession and disregard the circumstances under which children came to be in the physical possession of their abusive fathers in the first place. In most cases, the abuse that precipitated the departure of women from their marital homes and their concomitantly precarious circumstances are treated as irrelevant. Indeed, these common consequences of domestic violence are sometimes used against women insofar as courts cite them as justification for denying child custody to abuse victims. Even when they affirm women's allegations of domestic violence, courts rarely, if ever, consider the legal relevance of marital abuse to an assessment of children's safety in the determination of their best interests.

One female plaintiff claimed her husband frequently beat her, and that he had even beaten her during pregnancy. After she fled to her natal family, he reached out to her and, through the help of the villagers' committee, wrote a pledge letter in which he admitted his mistakes and promised to make amends. According to the plaintiff, he failed to keep his promise and continued beating her. Their oldest son was already more than 18 years old and not subject to a child custody order. The plaintiff requested custody of their younger son. The defendant did not challenge the plaintiff's allegations. His

<sup>7</sup> Case ID (2013)鄆民初字第02115号, archived at <https://perma.cc/2GCY-TDU3>.

defense statement was short and simple: he agreed to divorce and requested custody of their second son. The court held that “Because the second son Wen X is currently living with the defendant, and since a change to his environment would be harmful to his upbringing, custody is therefore granted to the defendant, and the plaintiff will make child support payments according to the applicable formula” (Decision #1425781, Puyang County People’s Court, Henan Province, April 23, 2015).<sup>8</sup>

Sometimes a husband will show up at the parental home of his estranged wife and beat her there. In one illustrative case, a plaintiff claimed that when her husband got drunk, he would punch and kick her (拳打脚踢), and had caused her physical injury doing so. She submitted several pieces of written witness testimony not only that he frequently beat her, but also that he went to her natal family to beat her there. The court accepted and affirmed the objectivity and relevance of the evidence and permitted it to be used in support of her claims. Although the court affirmed the plaintiff’s claims of marital abuse, and although the defendant failed to appear in court or to submit a written response to the plaintiff’s claims, the court granted custody of their daughter to the defendant because she was currently living with him and thus “in order not to change the life to which she was accustomed” (Decision #1189402, Zhecheng County People’s Court, Henan Province, June 16, 2014).<sup>9</sup>

Sometimes husbands even beat their parents-in-law. In an in absentia trial, the defendant failed to respond to the plaintiff’s claims that he not only regularly beat her but also on one occasion beat her and her mother simultaneously. For this reason, as the plaintiff explained, she was forced to leave the marital home and dared not return. In its holding, the court stated that “after the plaintiff left, the son, Yang X, was continually under the care of the defendant’s parents; since a change to his environment would be harmful to his upbringing, custody is therefore granted to the defendant; the plaintiff will pay commensurate child support payments” (Decision #488815, Yuzhou Municipal People’s Court, Henan Province, December 23, 2010).<sup>10</sup>

Even in cases in which the child may be in the physical possession of mothers, courts often consider the child the rightful property of

<sup>8</sup> Case ID (2015)濮民初字第183号, archived at <https://perma.cc/C3FE-TB4T>.

<sup>9</sup> Case ID (2014)柘民初字第189号, archived at <https://perma.cc/2MUR-SB77>.

<sup>10</sup> Case ID (2010)禹民一初字第2924号, archived at <https://perma.cc/AAN6-6GQE>.

the father. In one such case, a female plaintiff explained to the court that her husband had deceived her by luring her into marriage, after which he regularly beat her without provocation. He had written several pledge letters admitting his mistakes and promising to mend his ways. According to the plaintiff's statement, he resumed his old violent habits in short order each time. A quintessential divorce twofer, this was her second divorce petition. She felt she had no choice but to escape her situation by returning to her natal family. Although she had taken their young son with her, she ultimately returned to her marital home in an effort to reconcile. When the beatings resumed, she left again with her son, this time for good, and "with a broken heart." The court inexplicably granted custody to the defendant according to the "actual circumstances of the case," and ordered the plaintiff to pay child support (Decision #1211839, Jiaozuo Municipal Shanyang District People's Court, Henan Province, August 5, 2014).<sup>11</sup>

The lack of stable income may prevent courts from granting child custody to female domestic violence victims, but not from ordering them to pay child support. Courts can and do consider a woman too poor to assume custody but not too poor to pay child support. For example, a female plaintiff from a rural area claimed that her husband ruthlessly and ferociously beat her. She escaped his clutches two years prior to filing for divorce, left her young daughter behind, and dared not return home. The court granted custody to the father on the grounds that the plaintiff lacked a stable job and stable income. The court then ordered the plaintiff to pay child support (Decision #271720, Lushi County People's Court, Henan Province, December 29, 2009).<sup>12</sup>

In another example of what I have called a marital violence refugee, a plaintiff claimed that both her husband and mother-in-law frequently beat and cursed her and that her husband had carried out long-term physical violence and verbal abuse. She further claimed to have become a migrant worker in order to escape domestic violence. The court had denied her first divorce petition the year before. This time the court granted the divorce but denied her claim for child custody on the grounds that her son had been living with her husband's family and that her job stitching together sugar sacks did not provide her with sufficient means to assume child custody. The court nonetheless

<sup>11</sup> Case ID (2014)山民三初字第00194号, archived at <https://perma.cc/7GQ2-G79S>.

<sup>12</sup> Case ID (2009)卢民一初字第616号, archived at <https://perma.cc/5PEM-3J2C>.

ordered her to pay child support (Decision #3400274, Lanxi Municipal People's Court, Zhejiang Province, March 6, 2015).<sup>13</sup>

Judges in one case explicitly and bluntly endorsed the patriarchal family. In its decision to grant child custody to the male defendant, the court held: "Both plaintiff and defendant have made child custody claims. Given that their conditions for raising children are essentially equivalent, and in consideration both of the circumstances of the case and of local customary practice [当地习惯], custody of their son is granted to the defendant." The court may have responded with particular sympathy to the defendant's assertion that, owing to his residence in an isolated mountain village, his remarriage prospects were nil (Decision #2359853, Pingyang County People's Court, Zhejiang Province, August 2, 2010).<sup>14</sup> A different court made a similar ruling: "Both plaintiff and defendant requested custody of their son. In consideration of their family circumstances, the principle of the best interests of the child, local customary practice [当地风俗], and other factors, custody of their son should be granted to the defendant" (Decision #1070232, Xin County People's Court, Henan Province, October 8, 2013).<sup>15</sup>

To be sure, courts do not altogether ignore marital abuse. Indeed, courts affirmed plaintiffs' claims of abuse in almost every example in this section. In many instances, defendants even confirmed the plaintiff's allegations of abuse. However, judges rarely affirm abuse with the status of domestic violence. Affirming that a defendant beat a plaintiff is not the same as affirming the occurrence of domestic violence. Judges likewise often affirm injuries without affirming plaintiffs' claims that they were caused by domestic violence (Chapter 7). In one study, half of all claims of domestic violence were based solely on oral statements (Y. Jiang 2019:16–17). Even when plaintiffs do submit documentation in support of their claims, judges often refuse to admit it as evidence (Y. Jiang 2019). Judges tend to ignore the preponderance of evidence standard discussed in Chapter 2 as well as a provision in the 2008 Guidelines specifically calling on them to relax evidentiary standards, to use their common sense (自由心证), and to grant child custody to abuse victims when they determine, on the basis of

<sup>13</sup> Case ID (2015)金兰马民初字第31号, archived at <https://perma.cc/L6MY-TWGY>.

<sup>14</sup> Case ID (2010)温平水民初字第210号, archived at <https://perma.cc/FD4R-XTGR>. The language of the court's holding is similar to that in Article 4 of the 1993 Opinions. On men's remarriage challenges following divorce owing to a shortage of rural women, see Attané et al. (2019).

<sup>15</sup> Case ID (2013)新民初字第441号, archived at <https://perma.cc/U3EP-U5TF>.

compelling indirect evidence, a high probability of domestic violence even when they cannot directly affirm its occurrence (Article 63).

Consider this example. In support of her claim of severe physical and emotional harm caused by the defendant's domestic violence, the plaintiff submitted a CT report produced by the Lianshi Town Hospital. The court excluded this piece of evidence after the defendant objected to its admission on the grounds that it proved only that the plaintiff sustained an injury but not that the defendant caused the injury. The court then granted custody of their daughter to the defendant on the grounds that she had been continuously living with the defendant and his parents (Decision #4600907, Huzhou Municipal Nanxun District People's Court, Zhejiang Province, July 4, 2016).<sup>16</sup>

### **Judges Legitimated Child-Snatching by Fathers and Their Families**

In the foregoing examples, judges treated violence as irrelevant to child custody determinations. Physical possession trumped other considerations, including the safety of the child. Just as they are uninterested in the circumstances under which mothers leave their children behind, judges are similarly unconcerned about the circumstances under which children enter the physical possession of fathers. As a result, they even reward fathers for abducting and hiding their children.

In one case, the plaintiff requested custody of her daughter. On the basis of its assessment of the litigants' statements and the results of its investigation, the court affirmed the following facts:

Their daughter Yang Wenyuan was born on May 10, 2000. After getting married, the male side frequently drank to excess and, after getting drunk, carried out domestic violence against the female side. On July 8, 2007, once again after drinking, the male side beat the female side, after which the female side resolved to divorce him. Under the persuasion of relatives and others, the defendant wrote a pledge in which he promised to cease his heavy drinking and violence against the plaintiff. During the 2008 Spring Festival, they once again both got upset and at this point began their physical separation. While the trial was taking place, the defendant took their daughter Yang Wenyuan to live with him in the city of Kunming [the provincial capital of Yunnan].

With the help of the defendant's sister, the court was able to reach the defendant on the phone in Kunming. He stated, "I will consent to

<sup>16</sup> Case ID (2016)浙0503民初1017号, archived at <https://perma.cc/6R7V-D2JR>.

the divorce provided I get custody of my daughter.” In its holding, the court then justified its decision to grant child custody to the defendant by writing, “their daughter is currently living with the male side and, furthermore, the plaintiff indicated that she gave up her child custody claim” (Decision #219113, Nanzhao County People’s Court, Henan Province, August 20, 2009).<sup>17</sup>

As we will see next, the plaintiff’s apparent change of heart has the markings of a concession yielded in exchange for divorce. No sooner did the defendant demand custody as a condition of divorce than the plaintiff dropped her claim for child custody. The plaintiff appeared to have exchanged child custody for her freedom.

### **Judges Were Complicit in Women’s Bargaining Away Legal Rights in Exchange for Freedom from Marital Abuse**

Judges are highly unlikely to grant plaintiffs’ divorce petitions when defendants are unwilling to divorce, particularly on the first attempt (Chapters 7 and 8). For this reason, defendants wield bargaining leverage over the terms of the divorce. Statements such as this are common: “I will consent to the divorce if custody of both children and ownership of the house are granted to me” (Decision #808997, Luohe Municipal Yuanhui District People’s Court, Henan Province, June 28, 2012).<sup>18</sup>

Judges and litigants’ legal advocates sometimes try to persuade victims of domestic violence to withdraw their claims for child custody and property division (Li 2022). When these pressure tactics occur in pre-trial mediation, they may be invisible in the written court decisions. When they occur in the course of the trial, however, they can sometimes be inferred. Judges may record mid-trial concessions as claims that are withdrawn, added, or amended by litigants in the course of the trial. When they contravene plaintiffs’ original requests as expressed in their statements to the court, we can interpret them in one of two ways. First, they could reflect a negotiating strategy on the part of plaintiffs, whereby they petition for something they do not particularly want with the intent of subsequently offering it in exchange for something they do particularly want. Second, they could reflect efforts – by or under the auspices of courts – to bully plaintiffs into giving up something they genuinely wanted. Even in cases in which

<sup>17</sup> Case ID (2009)南召皇民初字第18号, archived at <https://perma.cc/TS6X-SXPU>.

<sup>18</sup> Case ID (2012)源民初字第297号, archived at <https://perma.cc/7YC7-NBJ7>.

the first interpretation is correct, courts are nonetheless responsible for putting children at risk by granting child custody to fathers with established records of violence.

After litigants present their claims and arguments to the court, they sometimes change their minds. This is often noted by judges in their written decisions in passages that begin with the phrase, “in the course of the trial” (庭审中).<sup>19</sup> Sometimes litigants negotiate on their own, and sometimes they respond to pressure from judges to compromise and make concessions. Only when judges explicitly indicate their mediation efforts (e.g., “through mediation” 经调解) can we differentiate between these two scenarios. Regardless of whether litigants bargain amongst themselves or judges broker deals, negotiations occur under the auspices – and subject to the approval – of the court.

If her husband refuses to divorce, a female plaintiff might need to give up child custody in exchange for her freedom. If she wants child custody, she will likely need to give up something – perhaps child support or marital assets, including the dowry and the bride price – in exchange for her husband’s consent to divorce. We can easily infer from one court decision that, in the middle the trial, the female plaintiff gave up child support from the defendant in exchange for child custody (Decision #1363347, Tanghe County People’s Court, Henan Province, March 11, 2015).<sup>20</sup> In another such case, the plaintiff stated to the court that she had taken her son to live temporarily with her parents after her husband beat her. The following month, when her husband arrived to try to take their son back home with him, a physical altercation ensued between the defendant, the plaintiff, and her father. The plaintiff alleged that, in the process, the defendant broke a bone in her hand. She also claimed that local police investigated and documented the incident. In her statement to the court, the plaintiff requested custody of their son and a one-time child-support payment of ¥60,000 from the defendant. The defendant, however, withheld consent to divorce unless the court granted custody of their son to him. In the course of the trial, quite possibly as a result of judicial mediation, “the plaintiff voluntarily withdrew her claim for child support,” softening the blow to the defendant of both the divorce itself and of losing custody of his son (Decision #2293399, Linhai Municipal

<sup>19</sup> Alternative phrases with the equivalent meaning include 本案诉讼中, 在审理中, and 在审理过程中.

<sup>20</sup> Case ID (2015)唐民一初字第93号, archived at <https://perma.cc/S4LH-S28P>.

People's Court, Zhejiang Province, March 18, 2010).<sup>21</sup> From the contents of the court decision, we can only speculate about whether the court pressured the plaintiff to forgo child support or she decided on her own accord to make this concession. Either scenario underscores the considerable leverage defendants wield simply by withholding consent to divorce and demanding child custody.

Women waive property claims for the same reasons. In a similar case, a plaintiff seeking to divorce her husband, who she claimed had beaten her four times and prompted her to call the police numerous times, thoroughly documented her claims with medical and police records. She requested custody of the older daughter but not of the younger son. The defendant, however, refused to divorce and demanded custody of both children if the court granted the divorce against his will. In the middle of the trial, the plaintiff suddenly “voluntarily gave up all claims to marital assets.” In the end, the court granted the plaintiff's petitions for divorce and custody of the daughter (Decision #655594, Shenqiu County People's Court, Henan Province, August 22, 2011).<sup>22</sup>

Whether the plaintiff made her concessions at the behest of the court or on her own is less important than the enormous sacrifices she made to achieve the divorce. “Wins” such as these come at a considerable cost. Although they have every legal right to child custody and marital property, women often end up losing one or both to men who have committed statutory wrongdoing and present safety risks to their children. Even if plaintiffs' concessions in cases like this are genuinely voluntary, they fly in the face of an arsenal of laws, judicial opinions, and official guidelines fully supporting – and even demanding – that judges protect the health and safety of children by keeping them out of the custody of abusive parents.

Supplementary case examples set #10–1 is online at: <https://decoupling-book.org/>.

### Judges Cherry-Picked Children's Opinions

On the rare occasions that judges solicited the opinions of children, they did so to justify preserving the status quo. As mentioned earlier, the opinion of the child is one standard that judges may use to determine

<sup>21</sup> Case ID (2010)台临民初字第414号, archived at <https://perma.cc/CC2F-8D48>.

<sup>22</sup> Case ID (2011)沈民初字第294号, archived at <https://perma.cc/4YRR-849V>.

child custody. At the same time, however, the 2008 Guidelines advise judges to discount or altogether disregard the child's opinion in cases involving domestic violence. Article 65 stipulates that children cannot accurately assess their own best interests (Item 1). It also stipulates that children remain emotionally attached to abusive parents they simultaneously fear and resent. It makes explicit reference to the Stockholm Syndrome as a reason why children may express a wish to live with an abusive parent (Item 2). The following female abuse victim's account lends credence to concerns about the safety risks to children, and to the need for caution when they express a willingness to live with their abusive fathers.

When we were divorcing, my son expressed his willingness to live with his paternal grandparents and father only because he knew they wouldn't allow him to live with me. We've been divorced for over one year. In the beginning his father wouldn't allow him to see me or to take my phone calls. This year he said he wanted to be with me, and I spoke about this with his paternal grandparents. His father seemed to be treating him a little better. But ten days ago my son and his father got into a fight, and his father swung a chair at him and missed. ... His father cursed at him: "You're going to give me a hard time? You think I'll let you give me a hard time? I sure didn't let your mother give me a hard time!" ... I'm worried about my son. I told him not to provoke his father, and that his grandparents would protect him if his father beats him. (R. Zhang 2017:48)

In the next case, marital violence that had been previously punished by the public security administration gave no pause to the judge. A plaintiff claimed to the court that her husband had beaten her many times over a period of years, and that she had reported him to the police. No longer able to endure his violence, she left him, and thus her son, behind. To support her claims, she submitted photographs, a hospital medical history booklet, and a CT report as evidence. In his defense, the defendant stated that in one incident he beat her only because they got into a fight after he "joked" that she was an "unvirtuous woman" (不守妇道), and that the local police substation had already dealt with the matter. The court acquired from the police substation copies of a public security administrative punishment decision and interrogation notes related to this incident. The defendant did not object to the medical documentation submitted by the plaintiff, and even confirmed the facts of the violent incident as stated by the plaintiff, but clarified to the court that "normally I did not beat the

plaintiff.” The police had punished the defendant with two days of administrative detention and a fine of ¥200. The court granted custody to the defendant on the basis of the son’s opinion and in order to avoid a change to his living environment (Decision #4533679, Cangnan County People’s Court, Zhejiang Province, May 12, 2016).<sup>23</sup> Even if the son’s opinion was sincere, and even if doing so respected the child’s opinion, the judge’s decision to keep him in the custody of a violent offender is antithetical to the spirit and letter of China’s family laws.

Indeed, it seems no behavior is out of bounds; nothing seems to disqualify a father from gaining child custody. In this next case, judges disregarded the opinion of a child with compelling safety concerns. A plaintiff’s divorce request was finally granted on the sixth attempt. According to the plaintiff, the defendant erupted into a rage at least four or five times per month for trivial reasons or no reason at all. Among the numerous egregious transgressions allegedly committed by the defendant was his abuse of their daughter. According to the plaintiff, he regularly beat and berated her. When, on June 8, 2009, the defendant threatened to stab their daughter to death, the plaintiff picked her up early from school and reported the incident to the police.<sup>24</sup> The plaintiff claimed that she and her daughter were equally fearful for her safety, and that her daughter supported the divorce and wanted to live with her mother. In support of her claims, the plaintiff

<sup>23</sup> Case ID (2016)浙0327民初1768号, archived at <https://perma.cc/TP4L-W382>.

<sup>24</sup> In a criminal case outside the scope of my random sample of child custody decisions, an abusive husband murdered his son who was left in his care after his wife fled with their two daughters. In 2007, after the wheat harvest, the defendant got drunk and abused – physically and verbally – his wife and children. For this reason, his wife ran away with their two daughters. She left their seven-year-old son at home. The defendant searched in vain for his wife and daughters. In April 2008, after getting drunk again, he took out his frustrations on his son. The defendant stated to the court, “My son was hungry, and pestered me to get him something to eat, so I took him to get a steamed bun in the village, but I couldn’t find any. I was mad, and bought a bottle of beer. After returning home I drank half of it. My son was still crying and fussing, demanding that I get him something to eat. I thought of how my wife left with our daughters without a care for our son. The more I thought about it the angrier I got. I was upset. I thought, your mother doesn’t want you, you’re starving, what’s the point of living? I’ll kill my son and then kill myself. I got a hoe from the courtyard and held it over my son’s head. I don’t know if I chopped his head three or four times. Blood was all over the floor.” A forensic autopsy report indicated the cause of death was an open craniocerebral injury. The defendant then jumped off a railway bridge in a suicide attempt. When that failed, he tried to smash his head with a rock. A local police officer took him away before he could further harm himself. He stated that he had drunk 100–150 ml of hard liquor in the morning, and about the same amount in the early afternoon before drinking half of the bottle of beer he purchased when he was out in search of food for his son. The court sentenced him to life in prison. Decision #75449, Zhumadian Municipal Intermediate People’s Court, Henan Province, May 27, 2009, Case ID (2009)驻刑少初字第10号, archived at <https://perma.cc/9LV3-ND7C>.

submitted an affidavit from their villagers' committee and several police reports documenting the defendant's death threats as well as a statement from their daughter indicating her wish to live with the plaintiff if the divorce were granted. Although the defendant objected to the child's statement, alleging that it was coerced by the plaintiff, the court affirmed it as factual and objective. The court finally granted the plaintiff's divorce request, but denied her claim for child custody: "Because the plaintiff has been living away from her family on a long-term basis, their daughter has been primarily under the care of the defendant and others. Throughout the litigation process, the defendant repeatedly expressed that 'I want to raise my daughter.' Furthermore, the plaintiff expressed that she can relinquish custody rights" (Decision #3000083, Haiyan County People's Court, Zhejiang Province, April 11, 2014).<sup>25</sup> Once again, the plaintiff's change of heart inserted into the court's holding smacks of pressure applied to the plaintiff to withdraw her petition for child custody. The contrast with the previous case is noteworthy. In the previous case, the son's opinion was deemed credible and accepted when it served the convenience of the court, whereas in this case the daughter's opinion was ignored and deemed unreliable when it was inconvenient to the court and contradicted the father's wishes. In both cases, the courts' decisions jeopardized the safety of children.

Not even a rape conviction convinced a judge to remove a child from the defendant's home. After a plaintiff claimed her husband frequently carried out domestic violence, she requested custody of both of her children, one daughter and one son, who at the time were being raised by her husband's parents. The defendant, claiming his wife had engaged in improper relations with another man, declared that he would agree to divorce only if his wife's lover were to assume criminal liability. The irony of his ultimatum stemmed from his own criminal liability. Although he was currently serving a prison sentence of three years and eight months for the crime of rape, he appeared in person for the trial. The defendant's parents beseeched the court to allow them to raise the children until his release from prison. The litigants' daughter, who was more than ten years old, submitted a written statement expressing her desire to continue living with her father in the home of her paternal grandparents. The court did not solicit the opinion of their son because he was less than ten years old. The court granted

<sup>25</sup> Case ID (2013)嘉盐沈民初字第172号, archived at <https://perma.cc/4UWB-2ABB>.

custody of both children to the defendant, ordered the plaintiff to pay child support, and allowed the defendant's parents to serve as temporary surrogate custodians while he served his prison sentence (Decision #1541542, Puyang County People's Court, Henan Province, June 17, 2015).<sup>26</sup>

### Judges Disregarded Risks to Children

The well-being of children is not an apparent concern of courts. Nowhere in any decision I read did judges indicate any concern that men who abuse their wives might endanger their children. Without any sense of dissonance or contradiction, judges say in the same breath that a man is abusive and dangerous to his wife but fit to serve as the primary custodian of a child. One wonders whether judges who write holdings such as the following truly believe that abusive husbands pose no risk of harm to their children. The judges in one case held that

the defendant repeatedly beat and injured the plaintiff. This is the direct cause of the deterioration of marital affection. For this reason, the defendant is at fault. The plaintiff had no choice but to file for divorce, and the plaintiff and defendant's marital affection can be regarded as having irretrievably broken down. The court therefore approves the request to divorce. The plaintiff and defendant's daughter, He X, has been continuously living with the defendant. From the perspective of the best interests of the child, the defendant is more fit to assume custody of He X. (Decision #334543, Xichuan County People's Court, Henan Province, July 19, 2010)<sup>27</sup>

Supplementary case examples set #10–2 is online at: <https://decoupling-book.org/>.

### SUMMARY AND CONCLUSIONS

Consistent with global legal norms, Chinese law stipulates that child custody should be determined according to the best interests of the child. Chinese law, however, is also vague on the details. Without clear standards on “best interests,” judges are given enormous latitude to cherry-pick legal provisions that facilitate expeditious decision-making.

<sup>26</sup> Case ID (2015)濮民初字第915号, archived at <https://perma.cc/QG24-N874>.

<sup>27</sup> Case ID (2010)浙香民初字第07号, archived at <https://perma.cc/5X29-QRUT>.

Judges routinely privilege the status quo over the safety of children. Even in egregious cases of violence carried out by fathers, typically against their wives, but sometimes even against their children, judges have little hesitation to grant child custody to the father. To judges, no behavior seems to be sufficiently beyond the pale to disqualify a father from assuming legal custody of a child.

Judges were gun-shy about ruling on contentious matters, including domestic violence, for several reasons. As judges faced growing pressure to close their cases, determining child custody according to the current living situation of the child was one of many prevailing legal standards, and was arguably the most convenient to judges insofar as its application obviated the need to investigate contentious claims and to assess relevant evidence. Judges also wanted to avoid upsetting violent husbands for fear of “extreme incidents” of retribution directed against their wives or the judges themselves (Chapter 3). When making a child custody determination, a Chinese court was therefore likely to affirm and uphold the child’s current living situation regardless of whether doing so undermined the interests of mother and child or contradicted competing legal standards that would more effectively protect the interests – including the health and safety – of mother and child.

A refrain commonly recorded in court decisions expressed by women seeking to divorce their husbands was that it was “for the sake of the child(ren)” that they waited as long as they did (often years) before finally leaving their abusive husbands. At one level, it simply means that mothers suffered protracted misery in order to provide for their children’s needs as best as they possibly could. At another level, it means mothers may have stayed in intolerable marriages knowing that leaving would have been tantamount to forfeiting custody rights and losing their children.

Although China’s Marriage Law was officially heralded as “revolutionizing the family” by upending patriarchal norms (Diamant 2000b), previous research as well as findings I present here show that rural courts in practice have served to validate and reproduce patriarchal norms. In opposition to China’s socialist ideology of gender equality and arsenal of laws intended to protect it, judges, consciously or unconsciously, have served to uphold China’s rural patriarchal order. As we will see in Chapter 11, courts supported the cultural imperative in many rural areas of preserving the family line through sons. Women’s child custody prospects were determined to a large extent by both the number and sex composition of children.